No. 12862

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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HARWOOD A. WHITE,

*Appellant,*

*vs.*

SUSAN C. KIMMELL and E. P. DUTTON AND COMPANY, INC., a corporation,

*Appellees.*

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## APPELLANT'S REPLY TO PETITION FOR REHEARING.

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### I.

### This Court Has Given Full Consideration to All Matters Raised by Appellee in Her Petition for Rehearing.

#### A. RULE 52(a).

Appellee's pointed reference to the fundamental and elemental principle enunciated in the above rule seems absurd to appellant. We feel sure that the court was fully cognizant of this basic principle and applied it properly whether or not it was specifically brought to the court's attention by counsel during argument. Counsel for appellant feels that unless there is some peculiar, special or unusual application of the rule presented by this case, which there is not, that it is presumptuous indeed to intimate that the court did not properly apply Rule 52(a).

B. The Trial Court Did Not Find Appellee's Witnesses Incredible.

The findings made by the trial court in this matter are so ineffectual that they are of little assistance in determining what the court did or did not believe. However, reference to the court's opinion clearly shows that he did not feel that either Maguire or Oettinger were liars. The trial court, to be sure, placed unwarranted interpretations upon the testimony of these witnesses or in many instances ignored it where it did not fit his wishes in respect to the decision made, but he does not indicate they were liars. These witnesses are respectable, honorable citizens with nothing to gain from the decision of the court, their testimony is absolutely unimpeached and is entirely credible and reasonable on its face. As a matter of fact, the essential facts testified to by these witnesses are plead by appellant in his complaint which commenced this proceeding. These facts are virtually all admitted by appellee's answer, the burden of which is that though the publication alleged was had, it constituted only a limited publication because distribution was made only to "persons particularly interested in the subject matter." Through the briefing in this matter there was little dispute in respect to facts, reference to the briefs shows clearly that the disputes arose over the conclusions to be drawn from admitted facts, the very facts to which these witnesses testified. Further, the controversy swings around the meaning of admitted declarations by the author himself made under admitted cir-

cumstances. It seems to appellant that it is highly ungracious, to say the least, for appellee, under the circumstances, to denounce these witnesses as liars. In respect to appellee's witnesses we say and have said that they were biased, partisan and highly opinionated, and testified to unsupported conclusions, drew unwarranted inferences and, in fact, did considerable arguing from the witness stand, but we have not charged that they deliberately falsified facts nor intimated that they were despicable liars. Such charges should be made, reluctantly and regretfully, only where deliberate falsehood is patent.

We think appellee's petition for a rehearing indicates an interest only in the outcome of the case with a complete disregard for the justice or propriety of such determination.

### C. No New Issues Are Raised by Appellee's Petition.

There is nothing mentioned in appellee's petition for rehearing which has not been duly considered heretofore. No suggestion is made other than that the trial court's findings and decision should not have been disturbed. Whether or not the trial court's decision was supported by the evidence was the basic point argued on this appeal and it was the decision of this court that it was not. Appellee's petition seems to be nothing but a generalized complaint to the effect that this court was wrong and the trial court right with nothing presented to support such

a contention that has not been completely and thoroughly briefed and argued and presented to and determined by this court.

It is respectfully urged that the petition should be denied.

Respectfully submitted,

SCHAUER, RYON & MCMAHON,
By ROBERT W. MCINTYRE,
*Attorneys for Appellant.*